A

# BANK PEMBANGUNAN DAN INFRASTRUKTUR MALAYSIA BHD

**v.**

B

## OMAR HJ AHMAD

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KANG HWEE GEE JCA
AZHAR MA'AH JCA
C [CIVIL APPEAL NO: B-02-181-2002]
18 MARCH 2010

***LAND LAW:*** *Charge - Third party charge - Third party charge relating to Malay Reserve land - Attestation by an advocate and solicitor instead*
D *of a Land Administrator - Whether ipso facto negated creation of an equitable third party charge - National Land Code, s. 349(3) - Malay Reservations Enactment (FMS Cap 142), s. 12*

E The plaintiff ("the bank") entered into a loan agreement with one Abdullah Sani Ismail ("the borrower") to give a loan of RM1,000,000 ("the loan") to finance the borrower's purchase of shares. The loan was to be secured, *inter alia*, by way of a third party charge over a piece of land ("the land"). The charge was executed by the chargor as the owner thereof, and attested by an
F advocate and solicitor. The bank had, pursuant to the said execution and attestation, disbursed the loan which had been used for the borrower's purpose. On 20 February 1991, the chargor had been adjudicated a bankrupt. Subsequently, the chargor lodged a private caveat on the land. However, the third party charge for
G Malay Reserve land could not be registered at the relevant land office because the charge was attested by an advocate and solicitor instead of a Land Administrator. The bank's originating summons, seeking *inter alia*, a declaration that there existed an equitable third party charge ("equitable charge") over the land was dismissed by
H the High Court. Hence, this appeal.

**Held (allowing the appeal; setting aside order of the High Court) Per Low Hop Bing JCA delivering the judgment of the court:**

I **(1)** The execution thereof by the chargor was cogent evidence of his express antecedent agreement to provide security for the loan which the bank had given to the borrower. In view of the chargor's express antecedent agreement, the wrong attestation by an advocate and solicitor, instead of a Land Administrator, in

relation to the Malay Reserve land would not, in the absence of any fraud, misrepresentation or any other vitiating factor, invalidate the charge (*Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd*) As there was antecedent agreement between the bank and the chargor to have the land charged to the bank as security, the wrong attestation thereof would not *ipso facto* negate the creation of an equitable third party charge over the land in favour of the bank. (paras 15 & 17)

**(2)** Although the chargor was already a bankrupt even before he executed the charge, that did not *ipso facto* affect his capacity to execute the third party charge, as he was at the material time still the registered proprietor of the land which had not become registered in the name of the official assignee. No land shall vest in the official assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in the name of the official assignee pursuant to s. 349(3) National Land Code. In addition, by virtue of the status of the land as Malay Reserve land, no such holding shall vest in the Official Assignee on the bankruptcy of the proprietor thereof: s. 12 Malay Reservations Enactment (FMS Cap 142). (para 19)

***Bahasa Malaysia*** *Translation Of Headnotes*

Plaintif ("bank") memeterai satu perjanjian pinjaman dengan Abdullah Sani Ismail ("peminjam") untuk memberi pinjaman RM1,000,000 ("pinjaman tersebut") untuk membiayai pembelian syer-syer oleh peminjam. Pinjaman dijamin, antara lain, melalui gadaian pihak ketiga di atas sekeping tanah ("tanah tersebut"). Gadaian telah dilaksanakan oleh penggadai sebagai pemilik tanah tersebut, dan disahkan oleh peguambela dan peguamcara. Bank telah, menurut pelaksanaan tersebut dan pengakusaksian, memberi pinjaman tersebut yang telah digunakan untuk tujuan peminjam. Pada 20 Februari 1991, penggadai telah dihukum bankrap. Seterusnya, penggadai meletakkan satu kaveat persendirian atas tanah tersebut. Tetapi, gadaian pihak ketiga untuk tanah Rizab Melayu tidak boleh didaftarkan di pejabat tanah berkenaan kerana gadaian disahkan oleh peguambela dan peguamcara dan bukan Pentadbir Tanah. Saman pemula pihak bank yang menuntut, antara lain, satu deklarasi bahawa wujudnya gadaian pihak ketiga berekuiti ("gadaian berekuiti") atas tanah tersebut telah dibatalkan oleh Mahkamah Tinggi. Oleh itu, rayuan ini.

**Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)**

**Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:**

**(1)** Pelaksanaan tersebut oleh penggadai adalah keterangan kukuh perjanjian nyata terdahulu untuk memberi jaminan pinjaman yang diberi oleh bank kepada peminjam. Memandangkan perjanjian nyata terdahulu penggadai, pengakusaksian yang salah oleh peguambela dan peguamcara, dan bukan Pentadbir Tanah, atas Rizab Melayu tidak akan, dalam ketiadaan fraud, salah nyata dan fakta-fakta yang tak sah, untuk mentaksahkan gadaian (*Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd*). Terdapatnya perjanjian terdahulu di antara bank dan penggadai untuk tanah tersebut digadaikan ke bank sebagai jaminan, pengakusaksian yang salah tidak akan *ipso facto* menidakkan pewujudan gadaian pihak ketiga berekuiti atas tanah dalam memihak kepada bank.

**(2)** Walaupun penggadai adalah seorang bankrap sebelum beliau melaksanakan gadaian tersebut, itu tidak *ipso facto* mempunyai apa-apa kesan untuk melaksanakan gadaian pihak ketiga, kerana beliau pada masa yang material itu masih pemilik berdaftar tanah tersebut yang belum lagi didaftarkan di bawah nama Pegawai Pemegang Harta. Tanah tidak akan diletakhak di bawah Pegawai Pemegang Harta di bawah penghukuman kebankrapan, atau perintah pentadbiran dalam kebankrapan, sehingga ia didaftarkan dalam nama Pegawai Pemegang Harta di bawah s. 349(3) Kanun Tanah Negara. Lagipun, berdasarkan status tanah tersebut sebagai tanah Rizab Melayu, tiada pemegangan diletakhak ke atas Pegawai Pemegang Harta atas kebankrapan tuan punya tersebut: s. 12 Enakmen Rizab Melayu (FMS Cap 142)

**Case(s) referred to:**

*A R R M Arunachalam Chetty Son Of Sithambaram Chetty v. 1. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee 2. Teah Soo Chew Trading Under The Style Of Teah Chin Seng [1955] 1 LNS 1 HC* ***(refd)***

*Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC* ***(refd)***

*Kapoor Singh v. Hj Ibrahim Hj Mohamed Noor [1941] 1 LNS 27 HC* ***(refd)***

*Kwan Chen Shen v. Citibank NA [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 HC* ***(refd)***

*Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266* ***(refd)***

*Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh [1969] 1 LNS 106 HC* ***(refd)***
*Ngan Khong v. Bamah Pakeh Jamin Rasid Luha [1935] 1 LNS 42 HC* ***(refd)***
*Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 HC* ***(refd)***
*United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352* ***(refd)***
*Vallipuram Sivaguru v. P C R M Palaniappa Chetty Official Administrator As Administrator Of The Estate Of Gan Inn, Deceased [1936] 1 LNS 69 HC* ***(refd)***

**Legislation referred to:**
Malay Reservations Enactment (FMS Cap 142), s. 12
National Land Code 1965, ss. 211, 349(3)
Rules of the High Court 1980, O. 92 r. 4

*For the appellant - Veronica Dominic; M/s Prasad Abraham & Assocs*
*For the respondent - Absent*

*[Appeal from High Court, Shah Alam; Originating Summons No: MT2-24-193-1998]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Low Hop Bing JCA:**

**Appeal**

**[1]** This is an appeal by the plaintiff ("the bank") against the decision of the learned High Court judge who had on 8 January 2002 dismissed the bank's originating summons.

**[2]** In the originating summons, the bank sought, *inter alia*, the following orders:

(1) a declaration that there exists an equitable third party charge ("the equitable charge") over the land held under GM 475, Lot No. 2116, Mukim Tanjong Dua Belas, Daerah Kuala Langat, Negeri Selangor ("the land");

(2) an order directing the defendant ("the chargor"):

(a) to execute a valid registrable third party charge over the land before the relevant Land Administrator in favour of the bank; and

A (b) to execute a withdrawal of a private caveat and to remove the private caveat lodged by the chargor on 5 March 1993.

(3) In the event the chargor fails to do the above, an order:

B (a) directing the Senior Assistant Registrar of the High Court to execute, on behalf of the chargor, all documents for the charge and the removal of the private caveat; and

(b) giving liberty to the bank to present the duly executed documents for the charge and removal of the private caveat C and for the Land Administrator to duly remove the private caveat and register the charge.

**Factual Background**

D **[3]** On 2 April 1992, the bank entered into a loan agreement with one Abdullah Sani bin Ismail ("the borrower") to give a loan of RM1,000,000 ("the loan") to finance the borrower's purchase of shares.

**[4]** The loan was to be secured, *inter alia*, by way of a third party E charge over the land. The charge was executed by the chargor as the owner thereof, and attested by an advocate and solicitor, instead of a Land Administrator. The land is Malay Reserve land.

**[5]** The bank had, pursuant to the said execution and attestation, F disbursed the loan which had been used for the borrower's purpose.

**[6]** Without the bank's actual or constructive notice, the chargor had been adjudicated a bankrupt on 20 February 1991.

**[7]** On 5 March 1993, the chargor lodged a private caveat on the G land.

**[8]** The third party charge for Malay Reserve land could not be registered at the relevant land office because the charge was attested by an advocate and solicitor.

H **[9]** Subsequently, the bank's originating summons, seeking the aforesaid orders, was dismissed by the High Court.

**[10]** On 9 November 2009, we allowed the bank's appeal, set aside the decision of the High Court and granted an order in terms of I the bank's originating summons. We now set out our grounds.

## Malay Reserve Land

**[11]** Learned counsel Ms Veronica Dominic submitted for the bank that the learned High Court judge had erred in law in dismissing the bank's originating summons, as the intention of the parties, *viz* the chargor, the bank and the borrower, is clearly to create a third party charge as security for the loan. It was argued that, at the very least, there was an equitable third party charge in favour of the bank and that charge can in turn be properly attested by a Land Administrator for subsequent presentation and registration as a third party legal charge.

**[12]** The chargor was absent, and was not legally represented.

**[13]** Given the above factual background and submission, the question for our determination is:

> Where a third party charge relating to Malay Reserve land has been executed by the chargor, but attested by an advocate and solicitor instead of a Land Administrator, has a third party equitable charge been created thereby, for subsequent registration as a third party legal charge upon due and proper attestation by a Land Administrator?

**[14]** On the facts, we would immediately emphasize that the charge, executed by the chargor but attested by an advocate and solicitor instead of a Land Administrator, is clearly not in accordance with s. 211 read with para. 3(1) of the Fifth Schedule to the National Land Code 1965. Hence it is not registrable thereunder as a legal charge.

**[15]** Be that as it may, the execution thereof by the chargor is cogent evidence of his express antecedent agreement to provide security for the loan which the bank had given to the borrower. In view of the chargor's express antecedent agreement, the wrong attestation by an advocate and solicitor, instead of a Land Administrator, in relation to the Malay Reserve land would not, in the absence of any fraud, misrepresentation or any other vitiating factor, invalidate the charge. While it is true that the factual matrix could not have created any legal charge, "our courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien, within the provisions of the National Land Code or the previous

A Code is executed or created": per Salleh Abas CJ(M) (later LP) in *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, 270 I rt FC, citing *Ngan Khong v. Bamah Pakeh Jamin Rasid Luha* [1935] FMSLR 81; [1935] 1 LNS 42; *A R R M Arunachalam Chetty Son Of Sithambaram Chetty v. 1. Teah Ah Poh Trading Under*
B *The Style Of Mun Seng Hin Kee 2. Teah Soo Chew Trading Under The Style Of Teah Chin Seng [1955] 1 LNS 1*; *Vallipuram Sivaguru v. P C R M Palaniappa Chetty Official Administrator As Administrator Of The Estate Of Gan Inn, Deceased* [1936] 1 LNS 69 HC; and *Mercantile Bank Ltd v. The Official Assignee Of The Property Of How Han Teh*
C [1969] 1 LNS 106 HC. His Lordship asserted that there is "no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charges and liens are permissible under our land
D law": *ibid*, p. 271 F left.

**[16]** *Mahadevan & Anor*, *supra*, was followed, *inter alia*, in *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917 at 929 g per Peh Swee Chin FCJ. In addition, we respectfully applied the maxim
E that equity deems that as done which ought to be done.

**[17]** Reverting to the facts in the instant appeal, as there was antecedent agreement between the bank and the chargor to have the land charged to the bank as security, the wrong attestation thereof
F would not *ipso facto* negate the creation of an equitable third party charge over the land in favour of the bank. We garner further support from *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No. 2)* [1988] 3 MLJ 352, 357 B left and C - D rt HC, where Edgar Joseph Jr J (later FCJ) held, *inter alia*,
G that the charge therein was evidence of an antecedent agreement (either oral or written) to charge the land and such agreement is valid and enforceable. His Lordship also reiterated that the Court has authority to decree specific performance of the agreement to charge the land by virtue of O. 92 r. 4 of the Rules of the High
H Court 1980 which is fortified by para. 4 of the Schedule to the Courts of Judicature Act 1964 which confers on our High Courts the power, *inter alia*, to order land to be charged.

**[18]** Our answer to the above question is therefore in the affirmative.

I

## Bankrupt Chargor

**[19]** Although the chargor was already a bankrupt even before he executed the charger, that does not *ipso facto* affect his capacity to execute the third party charge, as he was at the material time still the registered proprietor of the land which had not become registered in the name of the official assignee. Section 349(3) of the National Land Code 1965 provides that no land shall vest in the official assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in the name of the Official Assignee pursuant to this section. See eg, *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174 HC; and *Kwan Chen Shen v. Citibank NA* [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 HC.

**[20]** In addition, by virtue of the status of the land as Malay Reserve land, no such holding shall vest in the official assignee on the bankruptcy of the proprietor thereof: s. 12 of the Malay Reservations Enactment (F.M.S Cap 142), as further illustrated in *Kapoor Singh v. Hj Ibrahim Hj Mohamed Noor* [1941] 1 LNS 27 HC, per Murray-Aynsley J.

## Conclusion

**[21]** In the circumstances, we held that the learned High Court judge has erred in dismissing the bank's originating summons. We allowed this appeal, set aside the order of the court below and substituted it with an order in terms of the originating summons as enumerated in para. (2) above. However, we made no order as to costs. Deposit to be refunded to the bank (the appellant).